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SECOND UNITED NATIONS CONFERENCE TO REVIEW ALL
ASPECTS OF THE SET OF MULTILATERALLY AGREED
EQUITABLE PRINCIPLES AND RULES FOR THE
CONTROL OF RESTRICTIVE BUSINESS PRACTICES

Geneva, 26 November 1990
Item 8 of the provisional agenda

REVIEW OF ALL ASPECTS OF THE SET OF MULTILATERALLY AGREED EQUITABLE PRINCIPLES AND RULES FOR THE CONTROL OF RESTRICTIVE BUSINESS PRACTICES

(a) Review of 10 years of application and implementation of the Set

(b) Consideration of proposals for the improvement and further development of the Set, including international co-operation in the field of control of restrictive business practices

PREPARATIONS FOR A HANDBOOK ON RESTRICTIVE BUSINESS PRACTICES LEGISLATION

Handbook on Restrictive Business Practices Legislation

Note by the UNCTAD secretariat

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The texts of the above-mentioned laws appear as annexes to the English version of this document, in the languages in which they were submitted to UNCTAD.

INTRODUCTION

1. The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, in section F.6 (c), provides for the compilation of a Handbook on Restrictive Business Practices Legislation.

2. The Intergovernmental Group of Experts on Restrictive Business Practices, in the agreed decisions and conclusions adopted at its sixth session, requested the UNCTAD secretariat to continue compiling the Handbook, as carried out so far (in documents TD/B/RBP/33 and TD/B/RBP/42) taking into account the comments made by the regional groups at the session. Further compilations of the Handbook are contained in documents TD/B/RBP/49 and TD/B/RBP/58 and Add.1 submitted to the seventh and eighth sessions of the Group, respectively.

3. At its eighth session, the Intergovernmental Group of Experts, in its agreed decisions and conclusions, requested the UNCTAD secretariat to prepare for the ninth session of the Group, as well as for the Review Conference, a further compilation of the Handbook on Restrictive Business Practices Legislation (TD/B/1236-TD/B/RBP/67, annex I).

4. Accordingly, the UNCTAD secretariat prepared a note submitted to the ninth session of the Group (document TD/B/RBP/71) which contains commentaries on and texts of restrictive business practices legislation of the Federal Republic of Germany and Finland.

5. The present note contains commentaries received from Denmark, Poland, Spain and the United States of America, and it reproduces in the annexes texts of the RBP laws of these countries, in the languages in which they were received.

6. Thus, to date, the UNCTAD secretariat has issued notes containing commentaries and texts of RBP legislation from the following countries: Canada, Chile, Denmark, the Federal Republic of Germany, Finland, France, Kenya, Pakistan, Poland, Portugal, the Republic of Korea, Spain, Sri Lanka, Sweden, and the United States of America.

7. It will be recalled that the Secretary-General of UNCTAD, in his note of 2 March 1988 (TD/B/420/8(6)), requested States which so far had not done so, or which had introduced new or amending RBP legislation since their last communication to the UNCTAD secretariat, to provide the UNCTAD secretariat with their relevant legislation, court decisions and comments, on the basis of the format supplied (see below). In order to facilitate the reproduction of texts of legislation in more than one official language of the United Nations, States were invited, as called for by the Intergovernmental Group, to submit, if possible, the text of their legislation in one or more other languages of the United Nations.

8. The UNCTAD secretariat is grateful to the Governments that have contributed the material requested for the compilation of the Handbook, and again requests States which have not yet done so, or which have amended or enacted new legislation since their last contribution, to supply texts of their legislation and commentaries along the lines of the format attached to the note of the Secretary-General of UNCTAD mentioned above, and reproduced below.

FORMAT FOR CONTRIBUTIONS TO THE HANDBOOK

A. Description of the reasons for the introduction of the legislation.

B. Description of the objectives of the legislation and the extent to which they have evolved since the introduction of the original legislation.

C. Description of the practices, acts or behaviour subject to control, indicating for each:

(a) The type of control, for example: outright prohibition, prohibition in principle, or examination on a case-by-case basis;

(b) The extent to which the practices, acts or behaviour in section D, paragraphs 3 and 4, of the Set of Principles and Rules are covered by this control, as well as any additional practices, acts or behaviour that may be covered, including those covered by controls relating specifically to consumer protection, for example, controls concerning misleading advertising.

D. Description of the scope of application of the legislation, indicating:

(a) Whether it is applicable to all transactions in goods and services and, if not, which transactions are excluded;

(b) Whether it applies to all practices, acts or behaviour having effects on that country, irrespective of where they are committed;

(c) Whether it is dependent upon the existence of an agreement, or of that agreement being put into effect.

E. Description of the enforcement machinery (administrative and/or judicial), indicating any notification and registration agreements, and principal powers of body(ies).

F. Description of any parallel or supplementary legislation, including treaties or understandings with other countries, involving co-operation or procedures for resolving disputes in the area of restrictive business practices.

G. Description of the major decisions taken by administrative and/or judicial bodies, and the specific issues covered.

H. Short bibliography citing sources of legislation and principal decisions, as well as explanatory publications by Governments, or legislation, or particular parts thereof.

A. COMMENTARY BY THE GOVERNMENT OF DENMARK ON THE COMPETITION ACT 1989

Statute No. 370 of 7 June 1989

DANISH CONTRIBUTION TO THE HANDBOOK ON RESTRICTIVE PRACTICES LEGISLATION

The Danish Monopolies and Restrictive Practices Supervision Act 1955 (the Monopolies Act) and the Prices and Profits Act 1974 were repealed as from 1 January 1990 and replaced by a new Competition Act.

At the same time the Monopolies Control Authority was abolished and replaced by the Competition Council, which consists of a Chairman and 14 members. The members of the Council cover a comprehensive knowledge of commercial relations, including experience in legal, economic, financial and consumer-related matters. The Chairman and seven of the members must be independent of commercial interests.

A secretariat consisting of about 110 officials is attached to the Council. The Competition Council is under the jurisdiction of the Ministry of Industry, but has an independent status, and decisions made by the Council cannot be appealed to the Minister of Industry.

The reason for the introduction of new legislation was a political request for a modernization of the competition law in the light of the national as well as international development of market structures and competitive conditions.

Like the Monopolies Act, the Competition Act is also based on principles of control and abuse, but in contrast to previous legislation which was characterized by defensive measures, i.e. abuse of market dominance should be prevented, the new Act has a more offensive aim. The purpose of the Competition Act is to promote competition and thus strengthen the efficiency of production and distribution of goods and services, primarily by means of transparency created, for instance, through publication of reports on investigations of the competitive conditions, prices, incomes, etc. of certain enterprises or associations, etc., and, accordingly, the need for regulatory measures against competition is considered to be less pronounced.

Unlike the preceding legislation, the Competition Act also applies to banking and mortgage credit business and to insurance activities.

Furthermore, the Act applies to business activities performed, or subject to control or approval, by public authorities. However, the intervention and penalty of the Act are not applicable to such activities, but the Competition Council may approach the competent authority concerned and point to the potentially harmful effects on competition. Such communication shall be published.

The right of public access to documents under the Competition Act is basically unrestricted, unless the request for access concerns information about technical matters, and unless public access is found to inflict a considerable financial loss on an enterprise or association, etc.

The Competition Act provides for the fundamental right of the enterprises to make agreements, etc. The powers to take measures against harmful effects of restrictive practices are subject to preceding investigation of the matter concerned, and it is only after the Competition Council has ascertained that a certain matter is in conflict with the law that it has the possibility to intervene. The only direct prohibition of the Act is laid down in section 14, according to which enterprises are not allowed to enforce binding prices or profits on subsequent resellers.

The Competition Council may demand any information, including accounts, transcripts from ledgers and other business records, which is considered necessary for its activities, and it can order an enterprise to submit information on prices, business conditions, etc. Furthermore, agreements and decisions by which a dominant influence is or may be exerted on a certain market are subject to notification to the Competition Council.

The Competition Act contains no rules on control as regards consumer protection. The legislation up till now on price marking and display, which was administered by the Monopolies Control Authority, has been amended, and as from 1 January 1991 the administration of the new Act will be transferred to another public authority, the National Consumer Agency of Denmark, which also attends to the control of misleading advertising, etc.

The Competition Act applies to all goods and services, and measures can be taken against anti-competitive practices, including agreements and decisions which entail or may entail harmful effects on competition or restraints of the freedom of trade.

The Act aims primarily at creating transparency as a means to promote a workable competition. As a secondary means, the Competition Council can take measures, such as an order for the termination of agreements, fixing of maximum prices and profits, stipulation of specified calculation rules to be observed, and an order to take up or resume supplies to specified buyers, always provided, however, that the Competition Council has attempted to terminate the harmful effects through preceding negotiation. Only if negotiation leads to nothing, is the Competition Council in a position to take such measures.

If a party neglects an obligation under the Act to make notification, submit information, etc., the Competition Council may, as a coercive measure, impose on the party concerned a daily or weekly fine; moreover, a fine can be imposed on any party who intentionally or by gross negligence infringes the provisions of the Act.

The decisions made by the Competition Council may be brought before the Competition Appeals Tribunal, which consists of a Chairman, who is qualified for the post as a Supreme Court Judge, and two other members who shall be proficient in economics and law, respectively. The decisions made by the Appeals Tribunal can be appealed to the High Court and further to the Supreme Court.

Besides the Competition Act, the Competition Council also attends to the administration of the Competitive Tendering Act 1966. The purpose of this Act

is to create transparency in connection with the invitation and submission of bids within the building and construction sector, and to ensure equality of terms of the competitive conditions.

Furthermore, the Competition Council is the competent authority in Denmark as regards the application of the EC competition rules, and various tasks in that respect are imposed on the Council in pursuance of the Act on Control of Compliance with the EEC Regulations on Monopolies and Restrictive Practices 1972, and the Act on Control of the Observance of EEC Regulations No. 11/60 on Abolition of Discrimination as to Transport Prices and Transport Conditions 1972.

The new Competition Act was prepared in view of the growing internationalization of the markets, and internationally related matters are expected to increase. The EC relations imply that a number of responsibilities are placed under the Competition Council, such as participation in meetings of advisory committees and other EC institutions under the Council or Commission of the European Communities, and assistance to the EC Commission in connection with investigations of the competitive conditions in Denmark.

B. COMMENTARY BY THE GOVERNMENT OF POLAND ON THE LAW OF COUNTERACTING MONOPOLISTIC PRACTICES OF 24 FEBRUARY 1990

A. Reasons for introduction of the legislation

The Law of 1990 provides for the establishment of the Anti-Monopoly Office, for the control of monopolies and anti-competitive practices. It was introduced to protect economic subjects against monopolistic practices, to secure the interests of consumers and to help all producers and trade units operating on the market to compete freely with each other on the basis of quality and price.

B. Objectives of the legislation

The objectives of the legislation are:

1. to curb monopolistic practices and eliminate unfounded economic structures dominating on a given market;

2. to transform the subject structure not only according to the forms of property but also according to the size of the enterprises;

3. to ensure and protect competition.

C. Practices, acts or behaviour to control

Monopoly situations, merger situations and anti-competitive practices are not prohibited outright or in principle but are subject to examination on a case-by-case basis and are subject to control when they operate against the public interest.

The definition of monopolistic position for the purpose of the Law is if an economic subject does not encounter competition on the internal or local market. The Law prohibits also the exploitation of a dominant position which

is defined as existing when a producer does not encounter substantial competition on the internal or local market, i.e. when the producer's market share is in excess of 30 per cent.

The following are considered as monopolistic practices:

1. forcing onerous terms which yield the economic subject undue benefits,

2. making the conclusion of a contract contingent on performance by the other party of another service not connected with the object of the contract, which would not otherwise be agreed if there was a choice,

3. acquiring shares or stocks of companies or assets of economic subjects, when such acquisition could lead to a significant weakening of competition,

4. having the same person combine the functions of director, member of the board, supervisory council or audit commission in competing economic subjects when at least one of the subjects controls more than 10 per cent of the market.

The full scope of the monopolistic practices is contained in Chapter 2, articles 4-7 of the Law.

D. Description of the scope of application of the legislation

This Law applies to all individuals, corporate bodies and organizational units without corporate status conducting an economic activity. The Law applies also to chambers, associations and other organizations associating economic subjects.

The rules cover licence contracts and all arrangements in contravention of this Law.

E. Description of enforcement of the machinery

This Law is enforced by the Anti-Monopoly Office, which is established as a central state administration body charged with counteracting monopolistic practices, and subordinate to the Council of Ministers.

The Anti-Monopoly Office is headed by a President (appointed and recalled by the Prime Minister) and a Vice President.

The President of the Anti-Monopoly Office may establish branch offices headed by directors of these offices.

The scope of duties of the Anti-Monopoly Office covers:

1. supervising the observance of the regulations on counteracting monopolistic practices by economic subjects;

2. monitoring price formation under conditions of limited competition;

3. issuing, in cases defined by this Law, decisions on counteracting monopolistic practices and shaping the organizational structures of economic subjects, and decisions defining the responsibility of subjects for such practices;

4. registering economic subjects having a monopolistic position on the market;

5. doing research into the state of concentration of the economy and presenting to the subjects concerned the suggested actions to attain a balanced market;

6. drafting or advising on draft proposals for new laws concerning monopolistic practices;

7. preparing governmental proposals for the policy of development of competition;

8. performing other duties stipulated under this Law or other Laws.

In order to supervise the performance of duties, staff members of the Anti-Monopoly Office are empowered to carry out checks in economic subjects.

They have the right to:

1. enter the premises of the inspected economic subject;

2. look into documents of the inspected subject and demand copies and abstracts of documents;

3. demand explanations from employees of the inspected subject;

4. collect data and information on operations of the inspected subject, and also from other orgaizational bodies without additional authorization.

When economic subjects conduct an activity against the interest of other economic units, the Anti-Monopoly Office issues a decision prohibiting such an activity. The Anti-Monopoly Office issues also a decision prohibiting a merger, transformation or establishment of economic subjects if it leads to these subjects having a dominant position on the market. The part of the decision prohibiting monopolistic practices may be a fine payable to the State budget.

The fine may penalize the manager of an economic subject who fails to execute the decisions issued by the Anti-Monopoly Office.

Decisions of the Anti-Monopoly Office issued by virtue of this Law may be appealed against at the Anti-Monopoly Court within two weeks from receipt of such a decision.

F. Description of the parallel or supplementary legislation

Proceedings in anti-monopoly cases are taken by virtue of the Law "Code of Civil Procedures" and also the Law of 1958 on State Inspection of Trade by Warrant bodies of State Inspection of Trade to prosecute subjects conducting an economic activity in the field of trade contradictory to the r ions on counteracting monopolistic practices.

C. COMMENTARY BY THE GOVERNMENT OF SPAIN ON ACT NO. 16/1989 OF 17 JULY 1989 ON SAFEGUARDING COMPETITION

A. Reasons for the introduction of the new legislation

The reasons for the replacement of former Law No. 110/63 on practices that restrict competition by Act. No. 16/89 on safeguarding competition, which has been in force since 8 August 1989, include the following:

1. The fact that Law No. 110/63 was applied only to a small and unimportant extent in the more than 20 years during which it was in force;

2. The fact that certain articles were incompatible with the Spanish Constitution of 1978, while others were obsolescent;

3. The need for a more effective apparatus of standards and institutions to safeguard free competition, so as to guarantee free enterprise and the interests of consumers, as laid down in the Constitution;

4. The interrelationship and coexistence of European Community law on competition and Spanish law, arising from Spain's membership of the European Communities since 1 January 1986.

In view of the above-mentioned factors, a committee was set up containing representatives of not only the directorate and the court dealing with the safeguarding of competition, but also the ministries most directly concerned (Justice, Economy and Finance, Agriculture, Industry and Energy, Transport, Tourism and Communications, Health and Consumer Affairs, and Relations with the Cortes). This committee produced the text subsequently approved as Act No. 16/89 on safeguarding competition, of which copies in Spanish, French and English are attached.

B. Objectives of the legislation and developments leading to the current legislation

As the introductory section states, the Act has the specific purpose of guaranteeing the existence of sufficient competition and protecting it from any attack which is against the public interest, while at the same time remaining compatible with the other laws which regulate the market in keeping with other juridical or economic imperatives of a public or private nature.

Accordingly, the purpose of the Act may be summed up under two main headings:

The elimination of practices or situtions of market power which hinder the efficient allocation and distribution of resources;

Protection of the system against abuses arising from deliberate restrictions of competition.

If Act No. 16/89 is compared with former Law No. 110/63, the differences may be seen to be moderate as regards substance but more significant as regards structures, procedures and penalties.

1. As far as substance is concerned, the reform deals with the following matters:

(a) A broadening of the types of conduct banned, to cover not only practices restricting competition which stem from agreements or decisions, as in Law No. 110/63, but also the agreements or decisions themselves, whether or not they have been put into effect.

Collective recommendations, which were previously not covered, are also now included.

(b) In view of the fact that the law of competition must be flexible, and the great potential importance of co-operation between enterprises for the economy and for general welfare, the types of legally authorized conduct and the cases of individual authorization have been retained, and block exemption has been introduced as a new feature on the model of Community law.

The Act specifies a series of mandatory prerequisites for both individual authorizations and block authorization.

(c) Abuse of dominant position is covered in a similar way to that followed in article 86 of the EEC Treaty, with the notable feature that situations where certain enterprises are economically dependent on others (suppliers or customers) are included as a possible source of abuse.

(d) For the first time there is a provision which prohibits unfair competition if it affects free competition, without entering into detail, since a draft exists of legislation on unfair competition which will lay down rules to govern this area.

(e) Regarding operations involving concentration, there has been a shift from the simple obligation to register such operations to surveillance in so far as they have the potential to affect effective competition in the market or to create or strengthen a dominant position.

The Act lays down a number of thresholds beyond which such concentration operations must be reviewed.

(f) Lastly, the Act covers for the first time the provision of assistance from public sources, thereby safeguarding the principle of equal treatment by the State for all enterprises, whether in public or private ownership, and avoiding the risk of distorting competition.

2. As far as structure is concerned, the following changes introduced by the new Act deserve mention:

(a) The assignment of new tasks to the Court for the Safeguarding of Competition, relating to cases of concentration and to assistance from public sources;

(b) The expansion of the departments of the Directorate-General for the Safeguarding of Competition in keeping with its new tasks, with three Subdirectorates-General, for investigation and monitoring, studies and record-keeping, and surveillance of structures relating to competition.

(c) The abolition of the Council for the Safeguarding of Competition.

3. Lastly, the aim of the innovations introduced by the new Act in the field of procedures and penalties is to make the system more responsive and to dissuade potential offenders from committing acts which run counter to the goal of free competition.

(a) In the procedural field, mention should be made of:

The possibility for the investigator to be heard by the Court in specific cases;

The deferment of a ruling by the Court on application by the party concerned accompanied by documentary evidence that a case involving the same actions is being considered in a European Community context;

The regulation of precautionary measures;

The establishment of deadlines for the consideration of applications for authorization;

The power granted to the Directorate-General for the Safeguarding of Competition to close a case when it deems fit;

The granting of powers of investigation and inspection to the staff of the Directorate-General, on the model of Community law, thus enhancing their efficiency.

(b) Regarding penalties:

The new Act empowers the Court to impose fines directly, whereas under the former system it could only make a proposal concerning fines to the Government;

The principle of graduation and the introduction of penalties for delay on the model of Community law;

For the first time provision is made for the possibility of extending the imposition of penalties from offenders to legal representatives or directors who bear responsibility, in the case of juridical persons.

C. Content of the Act

(a) I. In relation to restrictive or improper agreements and practices, Act No. 16/89 on safeguarding competition refers to prohibited conduct and authorized conduct.

1. Prohibited conduct: the Act mentions various types of prohibited practice:

Collusion: The Act prohibits all agreements, decisions, collective recommendations or practices, concerted or knowingly adopted in parallel, which have as their purpose, produce or may produce the effect of hindering, restricting or distorting competition, in all or part of the Spanish market, and declares all prohibited agreements, decisions or recommendations null and void;

Improper conduct: The Act prohibits abuse of a dominant position in all or part of the Spanish market by one or more enterprises, including cases where such a dominant position has been instituted by legal means;

Unfair competition: The Act also prohibits unilateral acts which, through unfair means, have the potential to distort competition significantly.

2. Authorized conduct: Here we may differentiate:

Agreements, decisions, recommendations and practices which result from the application of a law or regulation promulgated in application of a law, and which are not prohibited;

Agreements, decisions, recommendations and practices, or categories thereof, which are prohibited but which may be authorized individually when:

They contribute to improving the production or provision of goods and services, or promote technical or economic development without imposing unnecessary restrictions in order to achieve the objectives sought, and without eliminating competition in respect of a substantial part of the market, enabling consumers to share in the benefits;

They are designed to protect or promote exports, bring supply into line with demand or substantially raise social and economic standards in depressed areas or sectors. This also includes those which, because they are of minor economic importance, have no significant impact on competition.

Categories of agreements, decisions, recommendations or practices which are concerted or knowingly adopted in parallel involving only two enterprises and imposing restrictions in distribution and/or supply, in the acquisition or use of industrial or intellectual property rights or industrial or commercial know-how, or are aimed at research and development or raising the competitiveness of enterprises.

This authorization may only be issued by means of an Exemption regulation.

II. As mentioned above, the Act establishes a system for monitoring cases of economic concentration which, on account of their size and effects, might modify the structure of the Spanish market in a manner contrary to the public interest.

The Act lays down a number of thresholds beyond which such concentration may be subject to review (the acquisition of, or growth to, a

share of 25 per cent or more of the Spanish market, or the passing of the figure of 20 billion pesetas in total sales in Spain for the parties taken together); the Ministry of Economy and Finance decides whether to refer the matter to the Court for the Safeguarding of Competition, with the final decision resting with the Government.

The Act also establishes a system of voluntary notification by those involved to the Directorate-General, under which deadlines of one and three months are laid down for referral to the Court and for a ruling by the Court, respectively.

Where the Court's report is forwarded to the Government, the latter has a period of three months to reach a final decision.

III. Where assistance from public sources is concerned, the Act institutes a system for analysing such assistance in the light of competition-related criteria and, where appropriate, preventing undesirable effects from the viewpoint of the general welfare.

(b) As has been emphasized above, all the practices listed in paragraphs 3 and 4 of section D of the Set of Principles and Rules fall within the purview of Act No. 16/89.

Consumer protection is specifically dealt with in Act No. 26/84, while misleading advertising is governed by the General Act on Advertising, No. 34/88.

However, the legislation on safeguarding competition is an effective instrument for consumer protection, in so far as consumers' interests are harmed appreciably by disruptions in free competition.

D. Scope of application of the legislation

Since the preceding section contains detailed comments on all the types of practices subject to surveillance, as well as others which fall outside the scope of the Act for various reasons, it will be sufficient to emphasize here that:

1. Act No. 16/89 prohibits not only practices restricting competition that arise from agreements or decisions, but also the agreements and decisions themselves, whether or not they have been put into effect.

2. It applies to all economic entities in the market, whatever their ownership status (public or private) or the stage of production or marketing in which they are involved, and to any person conducting activities of an economic nature, with the exception of a few sectors specified in the law.

3. Its scope of application is exclusively the national territory, whenever competition is affected (in all or part of the Spanish market).

E. Procedure and administrative machinery

Since the safeguarding of competition is a complex and highly specific area, the task of declaring the existence of restrictive practices must be

left to a single body or court enjoying the necessary independence for that purpose, while remaining subject to the necessary judicial oversight of its actions.

The application of the Act is entrusted to two administrative bodies - the Court for the Safeguarding of Competition (with powers to issue rulings and, where appropriate, to make proposals) and the Department for the Safeguarding of Competition (which is responsible for investigations); both fall under the Ministry of Economy and Finance.

1. Court for the Safeguarding of Competition. The tasks of this body which is composed of one President, eight members and one secretary, include the following:

To take decisions on matters assigned to it under the Act.

To invite the Directorate-General for the Safeguarding of Competition to proceed to the investigation of cases.

To authorize agreements, decisions, recommodations and practices.

To report on drafts of legislation and other issues relating to competition.

2. Directorate-General for the Safeguarding of Competition. This body, in which the Department for the Safeguarding of Competition was incorporated under Royal Decree No. 177/90, has the following functions, inter alia:

Investigation of cases.

Monitoring of the application of decisions of the Court for the Safeguarding of Competition, and of compliance with them.

Maintenance of a Register for the Safeguarding of Competition.

Studies of and research on various economic sectors.

The provision of information, advice and proposals concerning agreements, concentration and other issues relating to the safeguarding of competition.

Co-operation in the field of competition with foreign and international bodies and institutions.

All activities that foster an effective competition policy.

The Directorate-General is the competent authority for purposes of co-operation between the Spanish authorities and the Commission of the European Communities in relation to the application in Spain of the Community rules on free competition (Royal Decree No. 1882/86).

The procedure adopted in cases of prohibited types of conduct is divided into two stages:

Investigation (by the Directorate-General);

Decision (by the Court for the Safeguarding of Competition).

In the investigation stage, mention should be made of the investigatory powers of the Directorate-General and the fact that all natural and juridical persons, as well as national and local government offices, have a duty to co-operate with it, subject to respect for the right to inviolability of the domicile and installations of juridical persons, as laid down in the Constitution, access being permitted only with a warrant.

Investigation of a case may be initiated:

Ex officio;

At the request of an interested party:

By means of a complaint;

Following voluntary notification.

In either case, once the appropriate investigations have been carried out by the Directorate-General, the dossier is sent together with a report to the Court for a ruling. The Court may request new evidence prior to making its ruling.

An administrative remedy may be sought against the final ruling of the Court, or against an order for precautionary measures.

In its rulings the Court may: prohibit or authorize agreements, decisions, recommendations or practices; order a halt to the anti-competitive practices and, where appropriate, the elimination of their effects; or impose pecuniary penalties on the offenders.

All rulings of the Court for the Safeguarding of Competition which authorize or prohibit agreements, decisions, recommendations and practices, in full or in part, are recorded in the Register for the Safeguarding of Competition, which is open to the public. Concentration operations which have been the subject of cases initiated either ex officio or following a voluntary notification are also recorded.

F. Parallel or supplementary legislation

Spanish membership of the EEC has given rise to a linkage between Community law and Spanish law on competition.

Community law and Spanish law are different in scope. The former applies to agreements, decisions and practices that affect trade between member States and the structure of competition in the Common Market, while the latter applies to those exclusively affecting the Spanish market.

Community law also allows the parallel application of national law relating to free competition, providing that this does not detract from the uniform application of Community rules.

In addition, the national bodies (the Court and the Directorate-General for the Safeguarding of Competition) are called upon both to co-operate in the application of Community law by the Community authorities and to apply it directly when appropriate.

Lastly, as far as legislation supplementary to Act No. 16/89 is concerned, aside from Royal Decrees Nos. 1882/86 and 177/90, which have already been mentioned, efforts are under way to draw up regulations which elaborate on the Act in respect of block exemptions and notification of concentrations, as provided for in articles 5 and 15 of the Act respectively.

G. Decisions

Since 8 August 1989, when the new Act No. 16/89 on safeguarding competition entered into force, the Court has ruled on a total of 11 cases, all of them brought at the request of an interested party, seeking authorization for specific agreements.

Of the 11, 8 were authorized. They relate to subfranchising agreements; distribution and sales; licensing of utility models; exclusive distribution (2), patents, know-how and trade marks; transfer of premises; and contracts of sale and technical assistance.

The three which were not authorized relate to the establishment of hourly wage rates for motor vehicle repair workshops (2) and the treatment of bad debts.

As far as cases of concentration are concerned, five voluntary notifications have so far been received, only one of which was deemed by the Directorate-General to affect free competition. This case is currently being considered by the Court, which is due to report thereon.

Finally, as far as penalties are concerned, all the dossiers which have been opened to date on the basis of Act No. 16/89 are at the investigation stage. No rulings have yet been made by the Court.

H. Bibliography

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Royal Decree No. 177/90, incorporating the Department for the Safeguarding of Competition into the Office of the Secretary of State for Commerce (BOE 38, 13 February 1990).

Ruling on case No. 3/90 (Boletín de Información Comercial Espoñola (BICE) 2232, 7 to 13 May 1990.

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Ruling on case No. 1/90 (BICE 2233, 14 to 20 May 1990).

Ruling on case No. 5/90 (BICE 2233, 14 to 20 May 1990).

Ruling on case No. 2/90 (BICE 2238, 18 to 24 June 1990).

Ruling on case No. 10/90 (BICE 2238, 18 to 24 June 1990).

Ruling on case No. 14/90 (BICE 2238, 18 to 24 June 1990).

D. COMMENTARY BY THE GOVERNMENT OF THE UNITED STATES OF AMERICA ON UNITED STATES ANTITRUST LAW

A Summary of United States Antitrust Law

A. Reasons for the introduction of United States antitrust legislation

The United States has several statutes governing restrictive business practices ("RBPs"). These statutes generally are referred to as the "antitrust laws". The most important of these laws are the Sherman Act (15 United States Code sections 1-7), the Clayton Act (15 U.S.C. sections 12-27), and the Federal Trade Commission ("FTC") Act (15 U.S.C. sections 41-58). The Sherman Act was enacted in 1890, and the Clayton Act and the FTC Act were enacted in 1914. These laws were enacted as a reaction to cartel abuses by powerful railroad, coal, and oil trust companies, among others.

B. Objectives of the legislation

The antitrust laws of the United States were passed as a "charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade". Northern Pacific Railway v. United States, 356 U.S. 1 (1958). The purpose of the laws is to make consumers as well off as possible by ensuring a competitive market. Market competition enhances consumer welfare, because firms that can best meet the needs of consumers with the lowest prices or best service will prosper. Thus, competition tends to produce an efficient allocation of resources.

The courts' and enforcement agencies' views of types of conduct that should be prohibited by the laws have evolved through the years, as advances in economic knowledge have led to a greater understanding of which practices harm consumers and which practices benefit consumers. But this evolution reflects changes in the understanding of how best to achieve the objectives of the laws, and not changes in the objectives.

The United States antitrust laws "protect competition, not competitors". Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977). The mere fact that a particular competitor is injured by a practice does not mean that it is prohibited; in fact, it is inherent in the process of competition that some firms prosper while others do not. It is the process of competition that the antitrust laws protect.

C. Practices subject to control by the United States antitrust laws

1. Sherman Act section 1

Sherman Act section 1 provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

(a) The requirements for illegality under Sherman Act section 1

Section 1 contains three basic requirements for finding conduct unlawful. First, there must be an agreement - a "contract, combination, or conspiracy" - among two or more parties. Section 1 does not apply to conduct by one firm, in the absence of an agreement with one or more others. It is often difficult to tell whether there has been an agreement in a particular case, so the question whether there is an agreement has become one of the most frequently litigated issues in United States antitrust law.

Agreement may be proven by either direct or circumstantial evidence, and may be either explicit or tacit. Mere "conscious parallelism", which takes place when two or more firms knowingly take a similar course of action without an agreement to do so, does not constitute "agreement" under Sherman Act section 1.

Second, the agreement must be one that is an "unreasonable" restraint of trade. In deciding this question, the courts have developed two basic forms of analysis. Under th "per se" approach, the courts have found certain practices to be so inherently anticompetitive that they are held to be illegal restraints of trade without analysis of their competitive effects in a particular case. For example, price-fixing agreements among competing firms are per se violations. Under the "rule of reason" approach, by contrast, particular practices are analysed in detail and are held illegal only if it can be shown, based on the facts of the individual case, that the anticompetitive effects outweigh any competitive benefits resulting from the challenged conduct.

Third, the restraint of trade in question must restrain United States "interstate" or "foreign" commerce. Thus the Sherman Act does not apply to restraints that affect commerce within only one state of the United States. In practice, however, the courts have taken a broad view of the interstate commerce requirement. Local restraints of trade often have an effect on interstate commerce that is substantial enough to make the Sherman Act applicable even though the effect is indirect.

(b) The controlled practices

(1) Agreements among competitors ("horizontal agreements")

(a) Price fixing and market division

Agreements among competitors (i.e., "horizontal agreements") to fix prices or to divide markets are illegal per se under Sherman Act section 1. United States v. Trenton Potteries Co., 273 U.S. 392 (1927). Such agreements

fall into the "per se" category because they are plainly anticompetitive. They result in the elimination of price competition, enabling the conspirators to reduce output, raise prices to consumers, and obtain monopoly profits. The courts have concluded that such agreements can almost never have any desirable effect.

(b) Boycotts

A boycott is an agreement among several firms not to deal with another firm. Some boycotts have been found to be illegal per se. See, e.g., Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959). It is most accurate to say, however, that boycotts directly aimed at limiting or excluding competitors are per se illegal (because they may be part of a cartel agreement or have very similar effects), but other concerted refusals to deal may have legitimate business justifications and thus are likely to be tested under a rule of reason approach. See Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472. U.S. 284.

(c) Joint ventures

A joint venture is a business arrangement in which two or more companies join together for a common enterprise. For example, two steel companies may co-operate to distribute one of their alloys in a foreign country. Such joint ventures are tested under a rule of reason approach. However, the courts are particularly careful to make sure that these arrangements are not being used as devices to facilitate per se violations (such as price fixing).

(2) Agreements between sellers and purchasers ("vertical arrangements")

(a) Resale price maintenance

Relationships between firms at different levels of the production and distribution chain are called "vertical" relationships. For example, the relationship between a manufacturer and a wholesaler is vertical; so is the relationship between a tin producer and a tin can manufacturer.

For 70 years, the law has protected the right of firms to decide unilaterally with whom they will deal in vertical relationships. In Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911), the Supreme Court held that a manufacturer may not agree with its dealers on minimum resale prices. However, eight years later, in United States v. Colgate & Co., 250 U.S. 300 (1919), the Court made clear that only resale price maintenance agreements violate the Sherman Act, and that a manufacturer acting unilaterally may set resale prices and enforce adherence to those prices by terminating non-complying dealers. In United States v. Parke, Davis & Co., 362 U.S. 29 (1960), the court expounded upon and carefully circumscribed the Colgate doctrine, focusing antitrust attention on all the facts and circumstances surrounding a manufacturer's resale price maintenance efforts. And most recently, in Monsanto Co. v. Spray-Rite Service Co., 465 U.S. 752 (1984), which upheld a jury's treble-damage award based on sharply conflicting evidence, the Supreme Court ruled that it is improper to infer a resale price maintenance agreement from the fact that a manufacturer learns of a dealer's unacceptable pricing policy from another dealer. The Court recognized that the critical issue is whether the manufacturer's decision was an independent one or was undertaken pursuant to an agreement with someone else.

(b) Other vertical restrictions

In contrast to resale price maintenance agreements, which are per se unlawful, other vertical restrictions are analysed under the rule of reason. The Supreme Court, in Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977), concluded that a vertical restriction (in that case, a territorial limitation on retailers) might limit intrabrand competition (since retailers who sell the same brand are restricted to selling within their own particular territories), but at the same time it might also facilitate interbrand competition (since retailers may be induced to compete more effectively against other brands within their territories). The overall harm to competition from a vertical restraint that does not fix resale prices must outweigh the restraint's benefits to consumers before it is condemned under the law. Most vertical restraints are unlikely to be found illegal.

2. Sherman Act section 2

Sherman Act section 2 provides that it shall be illegal to "... monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations".

Sherman Act section 2 shares with section 1 the requirement of an effect (however indirect) upon the interstate or foreign commerce of the United States. However, section 2 differs in that an individual firm can violate it; there is no agreement requirement unless combination or conspiracy to monopolize is alleged.

(a) Monopolization

The offence of "monopolization" under Sherman Act section 2 has two requirements: (1) monopoly power in the relevant market and (2) the wilful acquisition or maintenance of that power as distinguished from its acquisition through growth or development as a consequence of a superior product, business acumen or historic accident. Under this test, size alone is not an offence. See, e.g., United States v. Aluminium Co. of America, 148 F.2d 416 (2d Cir. 1945); United States v. Grinnell Corp., 384 U.S. 563 (1966). Thus, it is not unlawful to have a monopoly, only to have one that was acquired or has been maintained in a harmful, destructive, or otherwise unlawful manner.

Monopoly power (or market power, as it is also called) is generally defined as the power to control prices or to exclude competitors in a relevant market. A firm generally must have a very large market share (substantially more than 60 per cent) in order to have monopoly power, although a large market share alone is not sufficient to establish monopoly power. For example, if it is very easy for new firms to enter an industry, then a large market share would ordinarily confer no power over price, because any attempt to raise price would be quickly eroded by new entrants into the industry.

Many monopolization cases hinge on the definition of the market, in terms of both the type of product offered and the geographic area that defines the market. For example, what is the relevant product market for a seller of carbonated beverages? Is it all carbonated beverages, all cold beverages, or all beverages? See Coca-Cola Co., 91 F.T.C. 517 (1978). Similarly, what is the geographic market for burglar alarm services? Is it a single city, a

metropolitan area, the whole country, or even the whole world? See United States v. Grinnell Corp., 384 U.S. 563 (1966). Market definition is of critical importance because it may mean the difference between a 1 per cent and a 90 per cent market share for a given firm.

In the "Cellophane" case, United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377 (1956), the Supreme Court established the principle that the product market is "composed of products that have reasonable interchangeability for the purposes for which they are produced - price, use and qualities considered". Firms that could readily make the products must be included in the market, even if they are not currently doing so.

Once the relevant product and geographic markets are defined, it is a relatively simple matter to determine market share. But even if a company has a very high market share, it will not be found to have monopolized a market unless it also satisfies the "wilful conduct" requirement. For example, a firm could be found to have engaged in such wilful conduct if it used its control over regulated local telephone service monopolies unreasonably to impede competition in other markets that could be competitive, such as long distance telephone services and the provision of telephone equipment. See United States v. American Telephone & Telegraph Co., 552, F.Supp. 131 (D.C.C. 1982) aff'd Sub.nom. Maryland v. United States, 460 U.S.1001 (1983).

Another example of conduct often alleged to be part of a monopolization scheme is predatory pricing. Predatory pricing consists of a large company pricing below cost for a period of time in order to drive smaller competitors out of business. After the competitors are gone, the company then charges monopoly prices. Of course, this strategy can work only if it is hard for others to re-enter the market once prices are raised. It is very important - and very difficult - to distinguish anticompetitive predatory pricing from simple "hard competition". It is essential carefully to observe this distinction, otherwise the antitrust laws might be enforced in a way that deters the very conduct that they seek to promote - vigorous competition. Economics and experience indicate that instances of true predatory pricing are relatively uncommon.

(b) Attempt to monopolize/conspiracy to monopolize

Proof of an attempt to monopolize or conspiracy to monopolize generally requires the same elements as monopolization, although the monopoly need not have been fully achieved in order to establish an attempt. Also, in order to establish an attempt to monopolize, it generally must be shown that the company in question had a "specific intent" to monopolize and that there was a dangerous probability that the attempt would succeed.

3. Clayton Act

(a) Mergers

Section 7 of the Clayton Act provides that mergers may be prohibited when their effect "may be substantially to lessen competition, or to tend to create a monopoly". Mergers that take place through the acquisition of stock or of assets are covered.

Parties contemplating a merger larger than a certain size must file with the government a "pre-merger notification". Although government approval is not required for a merger, notification provides the government with a short time prior to the completion of a merger to investigate the merger's potential effect on competition.

Mergers are often classified into three major categories. Horizontal mergers are those between competitors. Vertical mergers involve situations where a firm merges with either a customer or a supplier. Conglomerate mergers are those in which the merging firms had no direct pre-existing horizontal or vertical relationship. Horizontal mergers are generally the only mergers that give rise to competitive problems.

In general, a merger may be found to be anticompetitive if it would create monopoly power or if it would make it significantly easier for the remaining firms to collude in any relevant market. The courts consider many factors in determining whether a given merger is anticompetitive, including the market shares of the merging firms, the merger's effect upon potential competition, and the barriers to entry which exist in the affected markets. See United States Department of Justice Merger Guidlines (14 June 1984).

(b) Tying arrangements

Attempts by a seller to condition the sale of a product (the "tying product") upon the buyer's agreement to purchase another product (the "tied product") from the seller may be held to be illegal under section 3 of the Clayton Act where the effect of "such condition ... may be to substantially lessen competition or tend to create a monopoly in any line of commerce". Tying arrangements may also be challenged as unlawful agreements under section 1 of the Sherman Act.

The courts have said that tying arrangements are illegal per se, but the standard applied by the courts is different from the usual per se standard. Tying is illegal only if the firm has sufficient economic power appreciably to restrain competition in the market for the tied product, and if a "not insubstantial" amount of interstate commerce is affected in the tied product. See, e.g., International Salt Co. v. United States, 332 U.S. 392 (1947); United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610 (1977).

There has been some criticism of the legal rules concerning tying arrangements. The basic economic criticism is that tying arrangements should be analysed under a true rule of reason approach, since they may not always be anticompetitive. See, e.g., Jefferson Parish Hospital District No. 2 v. Hyde, 466, U.S.2, 33-35 (1983) (concurring opinion).

(c) Interlocking directorates

Clayton Act section 8 prohibits any person from sitting on the board of directors of two or more corporations that are competitors, if the corporations exceed a certain size. The purpose of this prohibition is to prevent competition from being diminished or eliminated by interlocking directorates.

4. Federal Trade Commission Act

The FTC Act gives the Federal Trade Commission authority to prevent corporations from engaging in "unfair methods of competition". The FTC has generally interpreted this phrase to mean conduct of the type prohibited by the Sherman and Clayton Acts. But it has also, on a few occasions, been applied to conduct that is not illegal under the other statutes. It is important to note that only the FTC (and not the Department of Justice or private parties) has the power to enforce the FTC Act, which it does through a wide variety of investigative and adjudicatory powers.

D. The scope of application of each statute

As previously mentioned, the federal antitrust statutes apply only when the particular restrictive business practice results in an effect upon interstate or foreign commerce. This is because the federal government's constitutional authority to regulate commerce is limited to interstate or foreign commerce. Local trade is considered a matter to be controlled by the individual states. As noted previously, however, the commerce requirement can be satisfied by a showing of any substantial indirect effect upon interstate or foreign commerce.

A number of states have adopted statutes that closely parallel the federal antitrust laws. These statutes apply to restraints of trade that have an effect in the particular state. Both state and federal antitrust statutes may apply to the same conduct.

The federal antitrust laws apply generally to service industries, as well as to industries involved in the production and sale of goods, although certain provisions of the Clayton Act do not apply to service industries. Thus, for example, medical services are included (see Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982)), and so are legal services (see Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975)), real estate broker services, and unregulated transportation.

However, a few industries and types of organizations are granted limited exemptions to the antitrust laws. As a general rule, these exemptions to the antitrust laws are interpreted narrowly. Examples of some exemptions include the insurance industry, organized labour, and agricultural co-operatives.

The scope of the international jurisdiction of the anti-trust laws has been controversial at times. United States antitrust laws can apply to foreign conduct if there is the requisite domestic anticompetitive effect. In 1982, Congress passed the Foreign Trade Antitrust Improvements Act to make it clear that there is United States antitrust jurisdiction over an act in export or entirely foreign trade only if the act results in a direct, substantial, and reasonably foreseeable anticompetitive effect upon United States domestic or import commerce, or on the business of a United States exporter.

E. Description of enforcement machinery

The major enforcement machinery for the United States antitrust laws is the judicial system. Decisions concerning whether an antitrust violation has taken place, and concerning the appropriate sanctions when such a violation

takes place, are generally made by the courts. Lower court decisions are subject to appeal to higher courts, including ultimately the United States Supreme Court.

However, within this framework the Department of Justice Antitrust Division, the Federal Trade Commission, and private parties injured by restrictive business practices all play a role in enforcement.

1. Antitrust Division of the Department of Justice

The Sherman and Clayton Acts authorize the federal Department of Justice to bring civil and criminal cases to enforce those laws. Within the Department of Justice, this responsibility is held by the Antitrust Division.

The Antitrust Division operates as an investigator and a prosecutor. In certain circumstances, it also gives advance statements of its intentions, called "business reviews", concerning particular proposed transactions.

The Antitrust Division investigates conduct that it suspects to be in violation of the antitrust laws by seeking information from the firms under investigation as well as from customers, suppliers, competitors, and industry experts. The Antitrust Division can compel firms to produce documents relevant to its investigations. It also can compel testimony from persons with knowledge of the matters under investigation, except that a person cannot be compelled to give testimony that is self-incriminating. A conspirator who is granted immunity from prosecution, however, can be compelled to testify against co-conspirators.

A criminal case brought by the Antitrust Division can lead to fines (up to $1 million for companies or up to $250,000 for individuals) and imprisonment (up to three years for individuals); in certain limited circumstances, the Division can also seek a fine equal to double the gross amount of the gain to the violator or the loss to the victim.

When the Antitrust Division brings a civil case, it ordinarily asks the court to issue an "injunction", a judicial order commanding the defendant to do something or to cease doing something. For example, a civil action involving a merger can result in an injunction directing a firm not to merge with its competitor.

2. Federal Trade Commission

The Federal Trade Commission is an independent regulatory agency established by Congress in 1914. The FTC enforces the Clayton Act, the Wilson Tariff Act, and the Robinson-Patman Act, as well as the Federal Trade Commission Act, Section 5 of which prohibits "unfair methods of competition".

The FTC initiates investigations as a result of staff work, private party complaints, or requests by other government agencies, the President, or members of Congress. After initial investigation, the Commission may approve the use of one of four compulsory means of obtaining information if voluntary requests will not suffice: annual or special reports, access orders, subpoenas, or civil investigative demands. To enforce compliance with such

compulsory means, the FTC must apply to a district court. Once the Commission votes to issue an administrative complaint, an administrative law judge supervises the process of collecting and hearing evidence.

The Commission's remedial powers include issuance of cease and desist orders for violations of Section 5 of the FTC Act. If such a cease and desist order is violated, the FTC may seek from a district court civil penalties of up to $10,000 per violation, an injunction, or other equitable relief. The FTC Act authorizes the Commission to ask a district court for preliminary injunctive relief while an administrative complaint against a merger or acquisition is pending.

5. Private parties

Private parties may bring civil suits in the courts for violations of the Sherman and Clayton Acts. A private party may (1) sue for three-fold the damages inflicted upon its business or property by an antitrust violator ("treble damanges"), (2) petition for injunctive relief against the violator (to prevent it from continuing the unlawful practices), or (3) raise as a defence, in a suit against it, the antitrust violations of the plaintiff.

The provison for treble damages gives private parties an incentive to sue. This encourages private enforcement.

F. Antitrust understandings with other countries

The United States has signed agreements on antitrust co-operation with the Federal Republic of Germany, Australia and Canada. The United States-German agreement, signed in 1976, calls for mutual co-operation in antitrust enforcement and for notification, consultation, and co-ordination in the event that an antitrust investigation in one country is likely to affect important interests of the other country. A 1982 agreement with Australia on antitrust matters provides for antitrust co-operation and a mechanism for resolving differences that arise when Australian Government policy and United States antitrust laws are in conflict. The United States and Canada are parties to a "memorandum of understanding", concluded in 1984, on procedures governing antitrust matters between the two countries. The understanding calls for co-operation in antitrust enforcement and establishes a framework for reducing potential antitrust conflicts between the two Governments.